PHON NAM

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[SC CRIMINAL APPEAL NO. 05-32-90]
15 JUNE 1991

CRIMINAL PROCEDURE: *Direction of trial Judge - Essentiality of additional evidence - Evidence of service of chemist report on accused - Balance - Interest of accused - Duty of prosecution - Prejudicial - Criminal Procedure Code s. 425.*

The appellant who has been charged under s. 39B(1)(a) of the Dangerous Drugs Act was acquitted without his defence being called as the Judge had ruled that it was not proper for him to exercise his discretion under s. 425 of the Criminal Procedure Code to call for evidence of service of the chemist reports on the appellant. The Deputy Public Prosecutor appealed and the Supreme Court remitted the case back to the High Court, directing the trial Judge to invoke s. 425 and to call prosecution witness PW10 to testify as to the service of the said chemist reports.

The trial Judge allowed the prosecution to recall PW10 when the trial resumed, but adjourned the trial to await the written judgment of the Supreme Court in the earlier appeal. On the prosecution's application, the Judge exercised his discretion under s. 425 to recall PW10 and PW1.

The defence Counsel made a submission of no case on the basis that the service of the chemist reports had not been proved beyond reasonable doubt as PW10 could not remember if the chemist reports were served on the appellant. Notwithstanding the argument, the defence was called, and the appellant was convicted and sentenced to death. This is an appeal from the conviction.

The issue for determination was the exercise of discretion by a trial Judge under s. 425 of the CPC.

Held:

[1] The discretion under s. 425 of the CPC is to be exercised depending on the facts of each case, the main consideration being the essentiality of the additional evidence for the purpose of arriving at a just decision of the case, the real object of s. 425 being that failure to call for additional evidence would not result in an erroneous acquittal or conviction.

[2] The exercise of the discretion is judicial and not arbitrary and must be in the interest of justice - a balance must always be maintained between the interest of the accused and the duty of the prosecution to prove every ingredient of the offence at the close of the prosecution case.

[3] In the instant case, the prosecution was given three opportunities to prove its case; therefore the balance was not maintained resulting in the appellant being prejudiced. The trial Judge had gone beyond the object of the law and had not properly exercised his discretion under s. 425 of the CPC.

[Appeal allowed.]

[**Bahasa Malaysia** translation of headnote]

PROSEDUR JENAYAH : *Arahan Hakim perbicaraan - Kepentingan keterangan tambahan - Keterangan mengenai penyampaian laporan pegawai kimia keatas tertuduh - Imbangan - Kepentingan tertuduh - Tugas pendakwa - Ketidakadilan - Kanun Prosedur Jenayah, s. 425.*

Perayu yang didakwa di bawah s. 39B(1)(a) Akta Dadah Berbahaya dibebaskan tanpa pembelaannya dipanggil kerana Hakim telah memutuskan bahawa adalah tidak patut bagi beliau melaksanakan budibicaranya di bawah s. 425 Kanun Prosedur Jenayah (KPJ) untuk memperolehi keterangan mengenai penyampaian laporan pegawai kimia keatas perayu. Penolong Pendakwa Raya telah merayu dan Mahkamah Agung mengemukakan kes tersebut ke Mahkamah Tinggi, dan mengarahkan Hakim perbicaraan menggunakan kuasanya di bawah s. 425 KPJ dan memanggil saksi pendakwa PW10 untuk memberi keterangan mengenai penyampaian laporan pegawai kimia tersebut.

Hakim perbicaraan membenarkan pihak Pendakwa Raya memanggil semula PW10 apabila perbicaraan diteruskan tetapi menangguhkan perbicaraan tersebut kerana menunggu alasan penghakiman Mahkamah Agung dalam rayuan awal. Atas permohonan Pendakwa Raya, Hakim melaksanakan budibicaranya di bawah s. 425 dan memanggil semula PW10 dan PW1.

Peguam pembela berhujah bahawa tidak adanya kes untuk dijawab oleh tertuduh atas sebab penyampaian laporan kimia tidak dapat dibuktikan atas bukti yang kukuh dan dengan itu membangkitkan keraguan atas kes pendakwa. Ini adalah kerana PW10 tidak dapat menjelaskan dengan tepat sama ada ia telah menyerahkan laporan kimia kepada tertuduh. Walau bagaimanapun, pembela dipanggil untuk membela diri dan perayu didapati bersalah dan dihukum mati. Ini adalah rayuan atas hukuman yang dikenakan. Isu untuk Mahkamah ialah perlaksanaan budibicara oleh Hakim perbicaraan di bawah s. 425 KPJ.

Diputuskan:

[1] Budibicara di bawah s. 425 KPJ harus dilaksanakan berdasarkan kepada fakta setiap kes, di mana pertimbangan utama adalah kepentingan keterangan tambahan bagi tujuan mencapai keputusan yang adil dalam kes yang berkenaan; tujuan utama s. 425 ialah untuk memastikan bahawa tertuduh tidak dibebaskan atau disabitkan kesalahan atas kegagalan pendakwa mengemukakan keterangan.

[2] Perlaksanaan budibicara adalah perihal pengadilan kehakiman dan bukan berasaskan rambang dan mesti dilaksanakan untuk kepentingan keadilan - satu imbangan harus dipelihara di antara kepentingan tertuduh dan tugas pendakwa raya untuk membuktikan setiap aspek tuduhan kes pendakwa raya pada penutupan kes pendakwaan.

[3] Dalam kes ini, pihak Pendakwa Raya diberi tiga peluang untuk membuktikan kesnya; oleh itu keimbangan tidak dipelihara dan ini menyebabkan ketidakadilan kepada perayu. Hakim perbicaraan telah melampaui matlamat undang-undang dan tidak melaksanakan budibicaranya dengan betul di bawah s. 425 KPJ.

[Rayuan diluluskan.]

Cases referred to:

PP v. Lin Lian Chen [1991] 1 MLJ 316
PP v. Phon Nam [1988] 3 MLJ 415
Ramli bin Kechik v. PP [1986] CLJ (Rep) 243
Reid v. The Queen [1980] AC 343
Teoh Hoe Chye v. PP [1987] CLJ (Rep) 386

Legislation referred to:
Criminal Procedure Code, s. 425
Dangerous Drugs Act 1952, s. 39B(1)(a)

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - C.T. Wong, DPP

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

On 17 September 1986 the appellant was charged in the High Court, Ipoh with trafficking in 128.80 grammes of heroin under s. 39B(1)(a) of the Dangerous Drugs Act. On 1 October 1986 the learned trial Judge acquitted the appellant without calling for his defence. The learned trial Judge had ruled that it would not be proper for him to exercise his discretion under s. 425 of the Criminal Procedure Code to call for the evidence of service of the chemist reports through a police constable although there was no dispute as to the existence of the chemist reports.

When the Public Prosecutor appealed against the acquittal this Court ordered that the case be remitted back to the High Court for continued hearing and directed the trial Judge to invoke s. 425 of the Criminal Procedure Code and to call DPC Mohd. Yunan bin Mohd. Ali (PW10) to testify as to the service of the two chemist reports (P25 and P26) on the appellant, *PP v. Phon Nam* [1988] 3 MLJ 415.

When the trial of the case was continued before the same trial Judge he allowed the prosecution to call the said DPC Mohd. Yunan (PW10). After completing the evidence of PW10 the prosecution closed its case.

Counsel for the appellant then submitted that the prosecution had not made out a *prima facie* case *inter alia* on the grounds that the proper service of the relevant chemist reports, P25 and P26 (in particular the main chemist report, P25) was not proven. For this contention he relied on the evidence of PW10 itself and what appeared on the two chemist reports. It can be seen clearly that although the chemist report P25 is dated 8 February 1985 the endorsement at the back of the report referred to a report dated 14 February 1984 and the said report dated 14 February 1984 was never produced. In his submission before us Counsel for the appellant also added that the signature acknowledging the service was not verified at all.

After hearing the reply by the learned Deputy Public Prosecutor the learned trial Judge allowed the prosecution to recall PW10 purporting to exercise his discretion under s. 425 of the Criminal Procedure Code but adjourned the trial to await the written judgment of this Court with regard to the earlier appeal. When the trial resumed on 25 March 1990 the learned Deputy Public Prosecutor (a different one from the earlier officer) submitted that the Court should exercise its discretion under s. 425 of the Criminal Procedure Code to enable the prosecution to recall PW10 as well as Insp. Mohd. Sakri (PW1) to clarify the dates of the chemist reports in question. The trial Judge allowed the prosecution to recall PW10. However in his evidence PW10 again repeatedly stated that he could not remember if copies of the chemist reports, P25 and P26, were served on the appellant.

In his second submission of no case in the continued trial the learned Counsel for the appellant emphasised that there was a vital link in the entire prosecution case which was missing and that was that the service of the chemist reports had not been proved beyond

reasonable doubt and referred to *Teoh Hoe Chye v. PP* [1987] CLJ (Rep) 386. He also submitted that not only was the signature of the appellant not verified but the signature of DPC Mohd. Yunan was not found on either endorsement.

However the trial Judge called for the defence and after hearing the defence convicted the appellant and sentenced him to death.

After hearing submissions in the appeal we allowed the appeal, quashed the conviction and set aside sentence.

In our view the sole issue here is the exercise of discretion under s. 425 of the Criminal Procedure Code by the learned trial Judge in this case. When the discretion under s. 425 of the Criminal Procedure Code should be exercised has been amply explained by this Court in the earlier judgment involving the same appellant as also explained in *Ramli bin Kechik v. PP* [1986] CLJ (Rep) 243. The discretion is to be exercised depending on the facts of each case, the main consideration being the essentiality of the additional evidence for the purpose of arriving at a just decision of the case.

The real object of the exercise of discretion under s. 425 of the Criminal Procedure Code is to enable the Court to arrive at a just decision so that the failure to call for the additional evidence would not result in an erroneous acquittal or in an erroneous conviction. The exercise of the discretion is not an arbitrary decision to favour the prosecution or the defence. The discretion is never intended to make "emergency repairs" to the prosecution case as correctly stated by Mohtar bin Abdullah J in *PP v. Lin Lian Chen* [1991] 1 MLJ 316.

At the core of s. 425 is the interest of justice and the exercise of the discretion must always be in the interest of justice. In our adversarial system it must not be forgotten however that the cardinal rule is that the prosecution must prove every ingredient of the offence at the close of the prosecution case. Because the exercise of discretion is judicial and not arbitrary a balance must always be maintained between the interest of the accused and the duty of the prosecution.

In this case it is clearly seen that despite being given the opportunity for a second bite the prosecution had failed to prove its case. What the trial Judge did after the close of the prosecution case at the continued hearing was to give the prosecution a third bite. The balance referred to earlier was therefore not maintained which resulted in prejudice to the appellant. As stated by Lord Diplock in *Reid v. The Queen* [1980] AC 343 PC if the Court were to give the prosecution a second chance to make good the evidential deficiencies in its case, why not also give a third chance and so on. His Lordship said to do so would amount to "an error of principle". Although His Lordship was dealing with the order of a new trial the same principle would apply here.

It would appear to us that the learned trial Judge went beyond the object of the law and therefore did not properly exercise his discretion under s. 425 of the Criminal Procedure Code as required by law.

Appeal allowed.

Also found at [1991] 2 CLJ 1467